IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-917

BARBIZON ELECTRIC CO., INC.,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The memorandum decision of the New York Appellate Division rendered in connection with the order sought to be reviewed is reported in 36 AD 2d 923, 321 N.Y.S. 2d 322. The memorandum decision dismissing petitioner's subsequent appeal to the New York Court of Appeals, for lack of a substantial constitutional question, is reported in 29 NY 2d 649, 273 N.E. 2d 321. The memorandum decision denying petitioner's motion to the New York Court of Appeals for leave to appeal to that court is reported in 29 NY 2d 486, 275 N.E. 2d 339.

The unreported opinion of the New York Supreme Court (FINE, *J.*), declaring the rights of the parties and dismissing the complaint herein is set forth in Appendix G to the reasoning employed in an earlier opinion by Justice POSTEL Petition (A-6). Justice FINE's opinion, in part, adopts the on the denial of a motion for a temporary in this action. The latter opinion appears in the record at pages 30-32.

Questions Presented

1. Is the Board of Estimate's participation in the advancement of the Clinton Community urban renewal project an exercise of governmental power for the purpose of the "one-man, one-vote" rule promulgated in *Hadley* v. *Junior College District*, 397 U.S. 50 (1970)?

This issue, as posed by petitioner, is premised on a material error of fact, namely, that the Board of Estimate exercised the legislative power of eminent domain in the premises. We argue that such power, under the New York City Charter, is exercised by the Mayor, and that the Board of Estimate participated in the urban renewal project in its planning phases preliminary to condemnation.

2. Was petitioner's property taken, under the guise of a housing project, for the covert purpose of transferring it to the New York Telephone Company?

Here, again, petitioner mistakes a material fact. In the Clinton Community urban renewal project, property, including petitioner's, was condemned for the purpose of clearing an area found to be substandard and insanitary. We argue that no substantial constitutional question as to the public purpose of the taking is raised by the fact that the property may be transferred to the telephone company for redevelopment.

3. Has petitioner been deprived of equal protection of the law because the Clinton Community urban renewal plan contemplates a sale of part of the site by negotiated disposition to a redeveloper, rather than by competitive bidding?

We argue that petitioner does not have a constitutional right to compete for the purchase of public property, and that the issue is premature and newly raised.

Statutory Provisions Involved

New York General Municipal Law, §505 (McKinney's Consol. Laws of New York, Book 23, pp. 237-239) and §506 (*op. cit.*, 1971-1972 Cum. Ann. Pocket Part, pp. 89-91) are set forth in Appendix G to the petition (A-20).

The following statutes are set forth in the appendix to this brief in opposition:

New York General Municipal Law, §502, subd. 1; §507, subd. 2(d) (McKinney's Consol. Laws of New York, Book 23, pp. 230, 245),

New York City Charter, §8; §199, subds. a, b; §381 (1 Williams Press 1963 Ed., pp. 7, 91-82, 129),

New York City Administrative Code, §B15-8.0 (2 Williams Press 1971 Ed., pp. 530-531).

Statement of the Case

Petitioner is the former owner of a parcel of real estate on the west side of Tenth Avenue, between West 52nd and 53rd Streets, in the Clinton section of Manhattan. The parcel (Block 1081, Lots 29, 31, 32) is within a six-block section proposed as an urban renewal site by the Clinton Planning Council and the Clinton Housing Association (Map [R. 50], 76). The substandard character of the area is not contested.

On August 18, 1969, the City Planning Commission approved the Clinton Community Development Plan for an urban renewal project at the site pursuant to N. Y. General Municipal Law, §505 (R. 89-94). In compliance with the statute, the plan was submitted to the City's Board of Estimate. On September 18, 1969, the Board held a hearing on the matter and laid it over to October 23, 1969.

On the adjourned date the Housing and Development Administration, the city agency in charge of urban renewal, submitted an amendment to one of the proposed resolutions before the Board. It provided that none of the telephone company's lots in Block 1082 would be acquired unless and until certain other lots in the site, specifically in the adjacent Block 1081, among them the formerly owned parcel of the petitioner, were transferred to the telephone company (R. 52). The hearing was then closed, and the Board of Estimate unanimously adopted four resolutions, Cal. Nos. 46-A, 46-B, 46-C, and 46-D (R. 52, 97-108); Calendar No. 46-C, in part, adopted the amendment proposed by the Housing and Development Administration (R. 104-105).

On March 16, 1970, the Mayor, the condemning authority of the City of New York, issued his certificate approving the acquisition of the urban renewal site and directing the Corporation Counsel to initiate the condemnation proceeding (R. 69, 109). The Corporation Counsel commenced the proceeding by the publication and mailing of notice that he would apply on April 15, 1970, to the Supreme Court, New York County, for an order of condemnation (R. 43-44). On April 13th, two days before the return day of the application, petitioner commenced this action for a declaratory judgment and permanent injunctive relief against condemnation

of its property, and it simultaneously moved by order to show cause, returnable April 14, 1970, for a temporary injunction to bar the City from acquiring title (R. 49, 59).

Petitioner, as condemnee, submitted no papers in opposition to the City's application for condemnation. It challenged the prospective taking only by way of the motion for the temporary injunction (R. 61). The order of condemnation was granted without opposition on June 1, 1970 (R. 9). The motion for the temporary injunction was denied the next day (R. 30; Pet. 9).

On December 3, 1970, the New York Supreme Court granted a judgment declaring the rights of the parties and dismissing the complaint in this action. The New York Appellate Division modified with relation to a technicality. It pointed out that the judgment of dismissal of the complaint was improper because the rights of the parties had also been declared. Aside from striking the paragraph dismissing the complaint, it affirmed the judgment. 36 AD 2d 923, 321 N.Y.S. 2d 322.

ARGUMENT

The "one-man, one-vote" issue and the "public purpose" issue urged by petitioner are based on erroneous factual premises and do not present substantial constitutional questions. Nor does the proposed transfer of part of the urban renewal site by negotiated disposition, rather than by competitive bidding at public sale, raise a substantial question under the equal protection clause. Petitioner's challenge to regularity of procedure under the New York urban renewal statute does not involve a constitutional question.

A. "One-Man, One-Vote" Issue

Petitioner argues that the City of New York exercises the delegated power of condemnation through its Board of Estimate (Pet. 12, 28). The Board's exercise of such power, petitioner contends, is invalid because the election of its members violates the "one-man, one-vote" rule (*id.* 17).

The premise of that argument is utterly incorrect. With the adoption of the 1963 New York City Charter, the residual powers of the City, including the power to authorize condemnation, were transferred from the Board of Estimate to the Mayor. New York City Charter, §8; New York City Administrative Code, §B15-8.0, subd. 1. Accordingly, the proceeding for the acquisition of the Clinton Community urban renewal site was instituted by direction of the Mayor, issued on March 16, 1970 under authority of Sections 8 and 381 of the charter (R. 69, 109). The Board of Estimate participated in the urban renewal project prior to the Mayor's authorization, when on October 23, 1969 it approved the urban renewal plan pursuant to the New York State

urban renewal statute (Gen. Mun. Law, Art. 15, §505). General Municipal Law, §505, does not concern condemnation. That is dealt with in Section 506.

So far as material, General Municipal Law, §505, provides (Pet. App. G [A-21]):

> "§505. Urban renewal plan and approval thereof
>
> * * *
>
> 3. After a public hearing held on due notice, not earlier than four weeks after the report is received or due from the [city planning] commission, *the governing body* may:
>
> (a) if the commission shall have certified its unqualified approval, approve the plan by a majority vote;" (Emphasis supplied).

So far as material, General Municipal Law, §506, provides (Pet. App. G [A-25]):

> "§506. Acquisition of property
>
> 1. (a) A municipality, acting through *its governing body*, may acquire by purchase, gift, devise, lease, condemnation or otherwise, in accordance with the provisions of the appropriate general, special or local law applicable to the acquisition of real property by such municipality, real property or any interest therein, * * *." (Emphasis supplied).

Petitioner has rendered both of these provisions to equate the term "governing body" with the Board of Estimate (Pet. 11, 30). Petitioner's interpolation is erroneous as to the acquisition provision.

The term "governing body" of a city is defined alternatively by the urban renewal statute (Gen. Mun. Law, §502, subd. 1 [a] [Append., *post*, p. A1]). In cities with a population of less than one million, the "governing body" is the local legislature. In the City of New York, the statute defines the term as "the officer or agency vested with power under the charter of such city, or by other law, to act pursuant to this article." Since more than one officer or agency of the City exercises charter-derived power in connection with urban renewal, each of them comes within the term "governing body" as defined in the statute.

As will be demonstrated, in respect of the approval of an urban renewal plan, the term refers to the Board of Estimate. In respect of the power to authorize the commencement of a condemnation proceeding, however, the "governing body" is the Mayor. Obviously, the Mayor's action in directing the commencement of a condemnation proceeding does not raise a question of whether his election to office complied with the "one-man, one-vote" rule.

As noted, the Board of Estimate participates in the urban renewal process by approving an urban renewal plan pursuant to General Municipal Law, §505, subd. 3. Petitioner argues, also, that such action is invalid for purposes of the "one-man, one-vote" rule because plan approval is "a purely legislative power" (Pet. 12). Aside from the fact, as we shall show later, that the Board of Estimate does not come within that rule, the argument is faulty. The Board of Estimate is the "governing body" for the purpose of General Municipal Law, §505, subd. 3, because it has power of approval over all projects affecting the City's Master Plan. (R. 98; New York City Charter, §199). An urban renewal project is in that category (R. 90). The Board's

approval of the urban renewal plan is an exercise of a function of city planning. The urban renewal project does not reach the stage of legislative action until the Mayor authorizes condemnation of the site.

In any event, for the purposes of the "one-man, one-vote" rule, the Board of Estimate is not a legislative body, nor does it exercise general governmental power. *Bergerman* v. *Lindsay*, 25 NY 2d 405, 410, 255 N.E. 2d 142, 145 (1969), apl. dism. and cert. den., 398 U.S. 955 (1970). *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), relied on by petitioner, does not aid its argument. The facts of the case, involving the election of trustees of a college district, are remote from the situation at bar. *Bergerman*, on the other hand, concerns the Board of Estimate, the very agency whose action is challenged here.

Petitioner's attempt to distinguish *Bergerman* assumes, in great part, that the Board of Estimate exercises the power of eminent domain on behalf of the City, which petitioner suggests is far more important to the electorate than the non-legislative budgetary power challenged in that case (Pet. 12, 22). As demonstrated, that assumption is mistaken. The function that the Board does perform in urban renewal, an exercise of shared power in the planning process, is reasonably similar in nature and degree, to its participation in the adoption of the budget, which was sustained in *Bergerman*.

Lastly, in connection with this issue, we note that petitioner, a corporation, concedes that it has not been deprived of an equal vote (Pet. 27-28). In the circumstances, it has no standing to raise the issue of "one-man, one-vote". *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 926-927 (2d Cir., 1968).

B. Public Purpose of the Taking

It is well settled that clearance of a substandard area is a public purpose, separate and distinct from the plans for its rehabilitation, which by itself will sustain an application for condemnation. Acquisition for clearance and resale to private redevelopers does not violate the principle that property may not be acquired by eminent domain for private use. *Berman* v. *Parker*, 348 U.S. 26, 34 (1954); *Kaskel* v. *Impellitteri*, 306 N.Y. 73, 78, 93, 115 N.E. 2d 659, 661, 669 (1953), cert. den. 347 U.S. 934 (1954); 2A Nichols *on Eminent Domain (Third Ed.)*, §7.51561, p. 7-188.

Petitioner, failing to understand the nature of an urban renewal proceeding, assumes that the underlying purpose of the acquisition of its property was to acquire a site for low and middle-income housing (Pet. 38, 42). That purpose, it argues, has been "subverted" by the proposed disposition of its former property to the telephone company (*id.*, 42). Such disposition, its says, is the "single indicated purpose" of the acquisition (*id.*, 29, 34, 43).

This argument rests on shaky ground. Petitioner concedes that its property was slated for acquisition under the original proposal for the Clinton project (*id.*, 37-38, 42). It remained so. The modification worked by the proposed transfer to the telephone company was, not the *inclusion* of petitoner's land in the urban renewal site, but the conditional *exclusion* of the land owned by the telephone company in the next block. Petitioner has no standing to complain of the exclusion. Without the modification, its former property would continue to be part of the urban renewal site.

Petitioner surmises that the exclusion of properties was initiated by the City because the "prior public use" rule would have barred the acquisition of the telephone com-

pany's land because the City has only a delegated and general power of eminent domain. The City, petitioner continues, is attempting to acquire the land by indirection (Pet. 39-40).

The purpose of the "prior public use" rule is to protect the public served by an actual use, not the owner of land who reserves it for future public use. Thus, the rule bars condemnation, under a general grant of authority, of property actually devoted to public use. *Buffalo Sewer Authority* v. *Town of Checktowaga*, 20 NY 2d 47, 53, 228 N.E. 2d 386, 390 (1967); 1 NICHOLS *on Eminent Domain (Third Ed.)*, §2.2, pp. 205, 211; 12 A. L. R. 1502, 1503. Even if the telephone company had objected to the condemnation of its lots and rejected any proposal for negotiated disposition and even if it had been successful in barring the taking of its property under the "prior public use" rule, petitioner's argument would not be strengthened. It still would have been proper for the City to condemn petitioner's property in the substandard area.

C. Equal Protection Issue

The amended urban renewal plan approved by the Board of Estimate excludes property of the New York Telephone Company (Block 1082, Lot 25) from the urban renewal site until and unless (a) certain lots within the site, including petitioner's former property, shall have been transferred to the telephone company by negotiated disposition and (b) the telephone company shall have been authorized to develop the said lots and adjacent land to a floor area ratio of 10 (R. 104-105). Such disposition, without competitive bidding, is authorized by General Municipal Law, §507, subd. 2 (d) [Append., *post*, pp. A1-A2].

Petitioner argues that a non-competitive disposition deprives it of equal protection of the law (Pet. 49-52). Petitioner's property was taken by due process of law in a condemnation proceeding, the regularity of which it does not challenge. It does not have a constitutional right to reacquire the property, as an urban renewal redeveloper, through the device of competitive bidding. The primary purpose of competitive bidding in the sale of publicly-owned property is to protect the public, not the bidders. A municipality's purpose in an urban renewal project may be served best by a non-competitive sale.

Petitioner argues that the telephone company is not a sponsor of the urban renewal project and will not use the part of the site concerned for a purpose consistent with the urban renewal plan (Pet. 51). This is a premature objection since the transfer to the telephone company has not been made and may not be made. If the transfer is made, it may be presumed that the City will require that the telephone company's improvement be compatible with urban renewal objectives. In any event, petitioner has no standing to challenge the redevelopment of its former property. Any impropriety in that respect could be redressed by contesting the improvement, not the prior condemnation for the purpose of clearing a substandard area. *Vanneck Realty Corp. v. City of New York*, 284 N.Y. 403, 407-408, 31 N.E. 2d 505, 506 (1940).

Lastly, we note that this issue of equal protection is newly raised. The petitioner's statement of the case does not specify how the issue was raised and passed upon below, as required by this Court's Rule 23 (f). Instead, petitioner's jurisdictional statement declares (Pet. 3):

> "All constitutional questions were raised in the Court of original jurisdiction as can be seen by the opinion and judgment of that Court."

The opinion and judgment of the New York Supreme Court should be read in the context of the complaint. So far as transfer of property without public auction is involved, that pleading challenges only the regularity, not the constitutionality, of the proposed negotiated disposition to the telephone company (R. 48, par. 19). Ruling on this issue, the opinion below states that the arrangement with the telephone company "does not affect the validity of the [urban renewal] plan" (Pet. Append. B [A-9]). The judgment includes a decretal paragraph to the same effect (Pet. Append. A [A-4]).

Although the New York Appellate Division did not render an opinion, it is clear that the equal protection issue now raised was not tendered to that Court. Petitioner's brief there challenged the absence of competitive bidding only on the ground of irregularity, as appears from the following heading of its Point IV:

> "THE BOARD OF ESTIMATE VIOLATED SECTION 384 (b) OF THE NEW YORK CITY CHARTER AND SECTION 507 OF THE GENERAL MUNICIPAL LAW."

D. Non-Federal Question

Petitioner makes a series of objections to the approval of the urban renewal plan, which may be summarized as follows (Pet. 52-64):

1. The City Planning Commission did not give notice of a public hearing on the plan.

2. The Board of Estimate approved an amendment of the plan not previously passed on by the City Planning Commission and did not give notice of the amendment.

3. The Board of Estimate did not make findings required by statute.

We pass the question of the factual accuracy of some of these charges and petitioner's omission to demonstrate that they all were raised below. On its face, petitioner's argument does not raise specific constitutional objections to the approval of the urban renewal plan, but merely challenges the approval for irregularity of procedure under General Municipal Law, §505 (Pet. 67). Petitioner concludes its argument with a bald assertion of unconstitutionality.

The challenged procedures, which preceded the Mayor's authorization to condemn, relate to the scope and expediency of the urban renewal project. A property owner has no constitutional right with respect to such preliminary steps. They must be followed by the final act of condemnation, which the Mayor may not choose to authorize.

It is only when the Mayor directs the initiation of a judicial proceeding for the acquisition of the urban renewal site that notice is given and, then only because it is required by statute in local proceedings. Absent the statutory requirement, notice of a taking is not constitutionally necessary. *People* v. *Adirondack Railway Co.*, 160 N.Y. 225, 239, 54 N.E. 689 (1899), aff'd 176 U.S. 335 (1900); *Appleby* v. *City of Buffalo*, 221 U.S. 524, 532 (1911).

Notice of the condemnation is not in issue here. Petitioner concedes that it was given (R. 43, par. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

February 2, 1972.

Respectfully submitted,

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APPENDIX

New York General Municipal Law

§ 502. Definitions

As used in this article and article fifteen-A of this chapter, the following terms shall mean:

1. "Governing body." (a) In a city, the board of aldermen, common council, commission or other body vested by its charter or other law with jurisdiction to enact ordinances or local laws, except that in a city having a population of one million or more the term "governing body" shall, as to such city, mean the officer or agency vested with power under the charter of such city, or by other law, to act pursuant to this article; (b) in a town, the town board; (c) in a village, the board of trustees.

* * *

§ 507. Disposition of property

* * *

2. Notwithstanding anything to the contrary contained in this article and notwithstanding the provisions of any general, special or local law applicable to the sale of real property by a municipality, such real property and appurtenances thereto may be sold, leased for a term not exceeding ninety-nine years or otherwise disposed of for the effectuation of any of the purposes of the urban renewal program in accordance with the urban renewal plan:

* * *

(d) to any person, firm or corporation designated by the agency as a qualified and eligible sponsor pursuant to the provisions of clause (1) of subsection (c) of this subdivision without public auction or sealed bids, provided that (1) the price or rental to be paid by such sponsor for such property

and all other essential terms and conditions of such sale, lease or other disposition shall be included in the notice published by the agency pursuant to the said clause (1) of subsection (c) of this subdivision, (2) that such sale, lease or other disposition be approved by the governing body after a public hearing held not less than ten days after the publication of such notice, and (3) such sale, lease or other disposition shall, in the case of projects aided by a state loan, periodic subsidy or capital grant or in which application has been made for such loan, subsidy or grant, be approved by the commissioner.

* * *

NEW YORK CITY CHARTER

§ 8. GENERAL POWERS.—a. The mayor, subject to this charter, shall exercise all the powers vested in the city, except as otherwise provided by law.

* * *

§ 199. PROJECTS AND CHANGES IN CITY MAP.—a. No improvement or project affecting the master plan or the city map and no addition to or change in the city map shall be authorized otherwise than as provided in this charter.

b. Before taking action on any proposed addition to or change in the city map not initiated by the commission, the board of estimate shall refer it to the city planning commission, which shall, after a public hearing, notice of which shall be published in the City Record for at least ten days immediately prior thereto, report thereon within ten weeks with respect to its relation to the master plan and the city map. The commission may delegate to any member or members of the commission the responsibility of conducting the hearing thereon in person and of preparing the report for action by the commission. However, if any ten persons

shall file with the commission, prior to the date of any such hearing, a written request that it be conducted by the commission, such hearing shall be so conducted. If the commission shall report that the proposed action conforms to the master plan or shall recommend the approval or modification of such action it may be taken in accordance with the recommendations of the commission by a majority vote of the board of estimate. If the commission shall report that the proposed action does not conform to the master plan and shall not recommend approval of such action or shall recommend a modification thereof not accepted by the board of estimate, or shall fail to make its report within the said period of ten weeks, the board of estimate may nevertheless take the said action, but only by a three-fourths vote.

* * *

§ 381. AUTHORITY TO ACQUIRE REAL PROPERTY.—The city may acquire title in fee to real property or any interest therein whenever required for any public or municipal use or purpose or for the promotion of public utility, comfort, health, enjoyment or adornment. Such title or interest shall be acquired according to law by purchase, condemnation or otherwise.

NEW YORK CITY ADMINISTRATIVE CODE

§ B15-8.0. APPLICATION TO CONDEMN; CONTENTS OF PETITION.

Upon the application to condemn, the corporation counsel shall present to the court a petition signed and verified by him, setting forth:

1. The order of the mayor authorizing the proceeding.

* * *